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No. 483] NEW DELHI, WEDNESDAY, OCTOBER 16, 1957/ASVINA 24, 1879

ELECTION COMMISSION INDIA

NOTIFICATION

New Delhi, the 11th October 1957

S.R.O. 3283.—Whereas the election of Shri Feroze Gandhi, son of Shri Jehangir Gandhi, resident of Queen Victoria Road, New Delhi and Shri Baij Nath Kureel son of Shri Bhola, resident of Beliganj, Rae Bareilly, Uttar Pradesh as members of the House of the People from the Rae Bareilly constituency has been called in question by an Election Petition duly presented under Part VI of the Representation of the People Act, 1951 (43 of 1951), by Shri Gurudayal Das, son of Shri Gyan Das, Satyanagar, Rae Bareilly, Uttar Pradesh.

And whereas, the Election Tribunal appointed by the Election Commission, in pursuance of the provisions of section 86 of the said Act, for the trial of the said election petition has sent a copy of its order to the Commission;

Now, therefore, the Election Commission hereby publishes the said order of the Tribunal.

BEFORE THE MEMBER, ELECTION TRIBUNAL, LUCKNOW

Dated Lucknow the 28th September 1957

PRESENT

Bishan Narain Nigam, I.C.S., Member.

ELECTION PETITION No. 475 of 1957

Shri Gurudayal Das, aged 44 years, son of Gyan Das, resident of Satya Nagar, Rae Bareilly, Uttar Pradesh—Petitioner.

Versus

1 Shri Feroze Gandhi, M.P., aged 44 years, son of Jehangir Gandhi, resident of Queen Victoria Road, New Delhi.

2. Shri Baijnath Kureel, M.P., aged 36 years, son of Bhola, resident of Beliganj, Rae Bareilly, Uttar Pradesh—Respondents.

ELECTION PETITION QUESTIONING THE ELECTION OF THE RESPONDENTS TO THE HOUSE OF PEOPLE OF INDIA FROM CONSTITUENCY No. 360—RAE BAREILLY PARLIAMENTARY TWO MEMBER CONSTITUENCY IN UTTAR PRADESH.

For the petitioners—The Petitioner in person.

For the respondents—M/s Bishan Singh and B. C. Agarwal.

JUDGMENT

Shri Gurudayal Das has filed this election petition praying that the declaration of both the respondents, Shri Feroze Gandhi and Shri Baijnath Kureel as returned candidates, be declared void.

The petitioner states that he was duly nominated and was a contesting candidate for election to the House of People of India from 360-Rae Bareilly Parliamentary Two Member Constituency in Uttar Pradesh for the reserved seat for Scheduled Castes. He was an independent candidate. The election was held on February 25 and 28, 1957 and March 3, 6, 9 and 12, 1957. The result was announced on March 25, 1957. In paragraph 14 he stated that the petitioner has deposited a sum of Rs. 1,000 as security for the cost of this petition in the Government Treasury, Rae Bareilly on 7th May, 1957 in favour of the Secretary to the Election Commission of India and enclosed a receipt with the petition.

A copy of the Treasury Challan is paper No. C-6. The relevant columns in this receipt read:

By whom tendered.—Gurudayal Das, Vakil Satya Nagar, Rae Bareilly.

Name (or designation) and address of the person on whose behalf money is paid.—Gurudayal Das, Vakil Satya Nagar, Rae Bareilly.

Full particulars of the remittance and of authority (if any).—Deposit for the cost of election petition against the returned candidates from the 360 Rae Bareilly Parliamentary double member constituency.

Amount.—Rs. 1,000.

Head of Account.—Central (Civil) Section P-Deposits and Advances—Part II-Deposits not bearing interest (c) Other deposits accounts. Civil Deposits Revenue Deposit—Deposits for Election Petitions.

Order to the Bank.—Correct. Receive and grant receipts Sd. S. Prasad. District Election Officer, Rae Bareilly; 7th May, 1957.

The Election Commission in its order dated 14th May, 1957 stated:—

"The Treasury Challan is defective inasmuch as the deposit has not been made in favour of the Secretary to the Election Commission. As the head of account, mentioned therein is correct, it is ignored for the present. The Tribunal will decide after hearing both the parties whether the provisions of section 117 of the Representation of the People Act, 1951 have been substantially complied with."

On 2nd September, 1957 the respondents presented an application that the Election Commission had noticed that the Treasury Challan was defective and that the requirements of section 117 of the Representation of the People Act had not been complied with. The petition was liable to be dismissed in-limine. The petitioner filed an objection on September 18, 1957.

Issues were framed on 18th September, 1957 and issues 19 to 23 were set down for preliminary decision.

Issues 19 to 23 read:—

Issue No. 19.—Whether the provisions of section 117 of the Representation of the People Act have been complied with?

Issue No. 20.—If not, its effect?

Issue No. 21.—Whether the failure of the Secretary Election Commission of India to point out the alleged defect in the treasury challan amounts to condonation of the defect, if any?

Issue No. 22.—Whether the failure of the respondents to raise this objection as to defect in the treasury challan amounts to a waiver on their part and estops them from raising this objection at this stage?

Issue No. 23.—If so, cannot this objection be considered by the Tribunal?

The parties were given an opportunity to adduce their evidence, if any; but they have not examined any witness. I have heard the petitioner and the learned counsel for the respondents.

FINDINGS

Issue No. 19.—Whether the provisions of section 117 of the Representation of the People Act have been complied with?

The reference is to Act XLIII of 1951. The contention of the petitioner is that the provisions of section 117 are mandatory but only so far as the enclosing of the receipt is concerned.

The learned counsel for the respondents has referred me to Maxwell on Interpretation of Statutes, Ninth Edition at pages 372 to 374 and to Punjab Cooperative Bank Ltd., Amritsar *versus* Commissioner of Income Tax, Lahore (All India Reporter 1940 Privy Council 230). Head note (b) lays down:—

"It is a well settled general rule that 'an absolute enactment must be obeyed or fulfilled exactly but it is sufficient if a directory enactment be obeyed or fulfilled substantially.'"

In *Jagannath versus Jaswant Singh* (All India Reporter 1954 Supreme Court 210) head-note (c) lays down that a provision of a Statute is not mandatory unless the non-compliance with it is made penal.

In *Thakur Amar Singhji and others versus State of Rajasthan and others* (All India Reporter 1955 Supreme Court 504) it is laid down in paragraph 46:—

"These rules of construction are well settled, but recourse to them would be necessary only when a Statute is capable of two interpretations. But where the language is clear and the meaning plain, effect must be given to it."

In *Aswini Kumar Ghose and another versus Arbinda Bose and another* (All India Reporter 1952 Supreme Court 369) it was laid down in head note (b):—

"It is not a sound principle of construction to brush aside words in a Statute as being in apposite surplusage, if they can have appropriate application in circumstances conceivably within the contemplation of the Statute."

In *Abrahams New York Election Law* at page 263 the learned author states:—

"An election contest is not an action at law or a suit in equity, but is purely a statutory proceeding unknown to the common law. The Court possesses no common law powers. Such statutory proceedings are special and summary in their nature. Therefore as a general rule, a strict observance of the Statute is required, so far as regards the steps necessary to give jurisdiction."

Orales on Statute Law, 4th edition, page 231 states:—

"An absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially i.e. the act permitted by an absolute enactment is lawful only if done in accordance with the conditions annexed to the statutory permission. If an absolute enactment is neglected or contravened, a Court of law will treat the thing which is being done as invalid and altogether void."

Rellance has also been placed on *Jagannath versus Jaswant Singh and others* (All India Reporter 1954 Supreme Court 210). In head-note (a) it is laid down:—

"The general rule is well settled that the statutory requirements of election law must be strictly observed and that an election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and that the court possesses no common law power."

The word "shall" is used in section 117 and the penalty is provided in section 90(3) of the Act. It is, therefore, clear that the provision is mandatory. The petitioner has also half-heartedly admitted this but has urged that it is essential only to enclose a receipt. This argument was also advanced before the Election Tribunal Bhopal in *Sheonarayan Vaidya versus Sardarmal Lalwani* (4 Election Law Reports 401) and the argument was repelled. It appears to me that it is rather difficult to understand the contention. The petitioner's case appears to be that section 117 is mandatory only so far as the enclosing of the receipt is concerned and is directly as to the rest of it. It does not appear to me that it is possible to split up the section in two parts. The petitioner is required to enclose a receipt. It is not just an ordinary receipt that he is required to furnish. The receipt must be one showing that a deposit of Rs. 1000 has been made in favour of the Secretary to the Election Commission as security for the costs of the petition. The language is clear and I do not see how it can be held that the mandatory character attaches only to the enclosing of the receipt. A comparison of the provisions of sections 34 and 117 makes it still more clear that the receipt must clearly show (1) that the deposit is made in favour of the Secretary to the Election Commission and (2) that it is as security for the costs of the petition.

The petitioner has also urged that the object of this section is to safeguard payments of costs and if that is fulfilled there should be no objection. I am unable to see any force in this objection. Substantial compliance can be made only in case the provisions are directory and not mandatory.

It is clear that the receipt does not show that the deposit was made in favour of the Secretary to the Election Commission. To that extent the receipt is defective. I, therefore, hold that the provisions of section 117 of Act XLIII of 1951 have not been complied with. The issue is answered accordingly.

Issue No. 20. If not, its effect:

Article 329 of the Constitution provides that notwithstanding anything in the Constitution, no election to either House of Parliament or to the House of either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature. Section 80 of Act XLIII of 1951 directs that no election can be called in question except by an election petition presented in accordance with the provisions of this part. In section 85 the Legislature clearly distinguished between the mandatory and directory provisions of this part and prescribes that the provisions of section 117 were to be held as mandatory. The effect therefore is that the election petition is liable to be dismissed. Issue decided accordingly.

Issue No. 21. Whether the failure of the Secretary, Election Commission of India to point out the alleged defect in the treasury challan amounts to condonation of the defect, if any?

Section 85 of the Act authorises the Election Commission to dismiss a petition if the treasury receipt does not comply with the provisions of section 117. The Election Commission was required after hearing the petitioner to dismiss the petition if it held that the provisions of section 117 had not been complied with; but the Commission to do so does not, in my opinion, amount to condonation. It may well be urged that the Election Commission failed to discharge the duty laid on it by law; but a failure to exercise a power and jurisdiction vested does not amount to a positive act of condonation. I am, therefore, of opinion that the failure of the Election Commission to point out the defect does not amount to condonation of the defect.

Issue No. 22. Whether the failure of the respondents to raise this objection as to defect in the treasury challan amounts to a waiver on their part and estops them from raising this objection at this stage?

Both the respondents in their written statements did not urge this objection. In fact both of them, in para 14 of their written statements stated that they did not deny the allegation of para 14 of the petition. Normally they should not be allowed to raise this objection except by way of an amendment of their written statements but the position of law is that a duty is cast on this Tribunal. Any failure on the part of the Election Commission and the respondents does not absolve the Tribunal of its duty to look into the question and to discharge this duty under section 90(3) of the Act. I, therefore, hold that the respondents are not estopped from pointing out this defect. I decide the issue accordingly.

Issue No. 23. If so, cannot this objection be considered by the Tribunal?

Section 90(3) of the Act is independent of section 85. Previously section 90(4) read as follows:—

"Notwithstanding anything contained in section 85, the Tribunal may dismiss an election petition which does not comply with the provisions of section 81, section 83 or section 117."

The present section 90(3) is differently worded. It reads:—

"The Tribunal shall dismiss an election petition which does not comply with the provisions of section 81, section 82 or section 117 notwithstanding that it has not been dismissed by the Election Commission under section 85."

The word "may" has been changed into "shall". It is no longer discretionary with the Tribunal to dismiss the petition or not. It is its incumbent duty to dismiss the petition if the provisions of section 81, 82 or 117 are found not to have been complied with. The previous wording may have given rise to the contention that if the Election Commission passed an order, the Tribunal could not make a contrary order in as much as the previous wording was "notwithstanding

anything contained in section 85" and not "notwithstanding any order passed by the Election Commission under section 85" but the present wording is "notwithstanding that it has not been dismissed by the Election Commission under section 85". I am of opinion that the position of the law is that even if the Election Commission has condoned this defect, this Tribunal is bound to consider the objection *de novo* and pass orders dismissing the petition if it finds that the provisions of any of the three sections mentioned in section 90(3) have not been strictly complied with. The reason is obvious. The Election Commission is required only to hear the petitioner and not the respondent.

Thus any condonation by the Election Commission or any waiver by the respondents or even estoppel operating against them will not prevent the Tribunal from considering the objection and adjudicating upon it. I am, therefore, of opinion that irrespective of the view taken on issue Nos. 21 and 22 i.e. whether or not there was any condonation by the Election Commission and whether or not there was any waiver by or estoppel against the respondents, this Tribunal is bound to adjudicate on the question and to give effect to its findings.

On a consideration of the issues, I am of opinion that the provisions of section 117 of Act XLIII of 1951 as to enclosing of receipt showing that a deposit of Rs. 1000 has been made in favour of the Secretary to the Election Commission has not been fulfilled. The petition is, therefore, liable to dismissal. In as much as the right to present a petition accrues only on strict adherence to and fulfilment of the conditions precedent i.e. a precise compliance with the provisions of sections 81, 82 and 117 of Act XLIII of 1951. The petition is, therefore, liable to be dismissed.

It is not necessary for me to enter upon the recording of evidence and to decide the other issues framed in the case.

The petition is, accordingly, dismissed with costs which I assess at Rs. 150. There will be only one set of costs as both the respondents are represented by the same learned counsel.

B. N. NIGAM, I.C.S., Member,
Election Tribunal Lucknow.
September 28, 1957.

[No. 82/475/57/7513.]

By Order
A. KRISHNASWAMY AIYANGAR, Secy.

